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NO. 84-1455

IN THE

Supreme Court of the United States

APRIL TERM, 1985

HAROLD A. BEDAT, *et al.*,
Petitioners,

vs.

McLEAN TRUCKING COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Whether the United States Supreme Court's decision in *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. ——, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983), which established a uniform six-month statute of limitations for claims arising under Section 301 of the Labor Management Relations Act, may be applied retroactively to actions pending on the date of that decision?

Parties

The defendants in this case are McLean Trucking Company, a North Carolina corporation with its principal place of business in Winston-Salem, North Carolina and with facilities in the state of Connecticut, and Locals 191 and 677 of the International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America. The following 13 named plaintiffs were at all relevant times employees of the corporate defendant and members of the Union defendants: Harold A. Bedat, John Benevento, Michael Varga, Richard Noel, William P. Densmore, Chester Bartnikovski, William Burnett, Thomas H. Byron, Robert Flora, Robert Stefurak, Richard Moisan, John Miklus, and Anthony Esposito.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Respondents, McLean Trucking Company and Locals 191 and 677 of the International Brotherhood of Teamsters respectfully pray that the Petition for a Writ of Certiorari be denied.

Statement of the Case

The plaintiffs in this case are 13 employees of McLean Trucking Company ("McLean"), employed at its Stratford and Waterbury, Connecticut, terminals. They are repre-

sented for collective bargaining purposes by Locals 191 and 677 of the International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America ("the Union"). In their Second Amended Complaint, the plaintiffs allege that prior to March 1, 1979, they were employees of the ONC Trucking Company. The plaintiffs further allege that, as of March 1, 1979, ONC Trucking Company was acquired by or merged into McLean, and that, in effect, the plaintiffs became employees of McLean and represented by the Union by that date.

The plaintiffs maintain that, by virtue of a collective bargaining agreement in effect between McLean and the Union on March 1, 1979, they were entitled to have their seniority with ONC Trucking Company credited toward McLean employment, and to be dovetailed into the McLean work force accordingly. The plaintiffs allege that, although they were initially dovetailed, they were subsequently denied their contractual right to dovetail seniority by retroactive application of a subsequently negotiated collective bargaining agreement between McLean and the Union, which became effective on April 1, 1979.

In their initial amended complaint, filed on September 3, 1980, the plaintiffs alleged that on August 16, 1979, the New England Joint Area Conference Committee heard their grievances concerning loss of seniority and determined that they were not entitled to dovetail seniority rights. These allegations were subsequently eliminated from the plaintiff's Second Amended Complaint, but were reasserted by the plaintiffs in their brief on appeal to the United States Court of Appeals for the Second Circuit. The plaintiffs also contended in their brief on appeal that the Union refused to take the arbitration decision of the New England Joint Area Conference Committee to a higher level on or about September 6, 1979.

By a Complaint filed on June 13, 1980, the plaintiffs brought this action against McLean and the Union pursuant to Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §185. In their undated Amended Complaint, filed on September 3, 1980, the plaintiffs allege that McLean and the Union breached a collective bargaining agreement by wrongfully denying them dovetail seniority rights, and that the Union also breached its duty of fair representation toward them. In addition to a claim for monetary damages against the defendants, the plaintiffs sought equitable relief, including an order vacating the arbitration award issued by the New England Joint Area Conference Committee denying the plaintiffs' grievances concerning loss of seniority.

McLean filed a Motion to Dismiss on September 8, 1980, seeking, *inter alia,* to dismiss that portion of the plaintiffs' Complaint which would require the court to vacate the arbitration award of the New England Joint Area Conference Committee, for the reason that the court lacked jurisdiction to vacate the arbitration award, and for the further reason that the plaintiffs had failed to take action to vacate the arbitration award within three months after the filing or delivery of the award. Based on the reasoning of the Supreme Court in *United Parcel Service, Inc.* v. *Mitchell,* 451 U.S. 56 (1981), the United States Magistrate (Latimer, Mag.) granted McLean's Motion to Dismiss by a Memorandum of Decision dated June 2, 1981, finding that the plaintiffs' Section 301 action had not been timely filed. The Magistrate's decision was approved and adopted by the District Court (Burns, J.), in a ruling dated August 25, 1981.

The plaintiffs then filed a motion, dated September 2, 1981, requesting leave of the court to file an Amended Complaint. In an effort to avoid the adverse impact of

the Supreme Court's decision in *United Parcel Service, Inc.* v. *Mitchell, supra,* the plaintiffs' Second Amended Complaint deleted references to the New England Joint Area Conference Committee's "final and binding" arbitration award, along with the request that the court vacate that award. Instead, the plaintiffs alleged in their Second Amended Complaint that the Union failed to file and process grievances to protect the plaintiffs' seniority, and that as a consequence, the plaintiffs' grievances were never arbitrated. Despite objections by both McLean and the Union, the plaintiffs' Motion to Amend their Complaint was granted by the United States Magistrate (Latimer, Mag.) on March 24, 1982, and was approved by the District Court (Burns, J.) on April 19, 1982.

By a Motion to Dismiss dated July 28, 1982, McLean sought dismissal of the Second Amended Complaint on the grounds that the claims set forth in that Complaint were barred by the statute of limitations set forth in 9 U.S.C. §12 and/or Section 52-420 of the Connecticut General Statutes. On June 8, 1983, while this Motion to Dismiss was still pending, the United States Supreme Court issued its decision in *DelCostello* v. *International Brotherhood of Teamsters,* 462 U.S. ——, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983), holding that the six-month limitation period set forth in Section 10(b) of the LMRA, 29 U.S.C. Section 160(b), governed hybrid Section 301/unfair representation suits. Accordingly, by Motions to Dismiss dated July 5, 1983, and July 12, 1983, respectively, both McLean and the Union again sought the dismissal of the plaintiffs' Second Amended Complaint, this time for the reason that the plaintiffs' claims were barred by the six-month limitations period established by the Supreme Court in *DelCostello.*

On February 8, 1984, the United States Magistrate (Latimer, Mag.) granted the defendants' Motions to Dismiss, finding that the plaintiff's claims were barred by the six-month limitations period set forth in Section 10(b) of the LMRA. The District Court (Dorsey, J.) accepted and adopted the Magistrate's ruling, over objection of the plaintiffs, on May 22, 1984. Judgment was entered for both defendants on May 24, 1984.

The plaintiffs appealed from the judgment of the District Court, claiming that the court erred in dismissing their Complaint. Specifically, the plaintiffs argued that the District Court should not have applied *DelCostello* retroactivley, and that certain proceedings before the National Labor Relations Board operated to toll the relevant statute of limitations, so that their Complaint was not time-barred in any event.[1] In an informal opinion dated December 14, 1984, the United States Court of Appeals for the Second Circuit rejected the plaintiffs' arguments and affirmed the judgment of the district court.

Summary of Argument

Certiorari should be denied. The *DelCostello* court itself gave retroactive effect to its holding that the six-month limitations period set forth in Section 10(b) of the LMRA governs hybrid Section 301/unfair representation cases. The Second Circuit, in holding that *DelCostello* applies retroactively in this case, properly deferred to this Court's implicit position on the retroactivity issue. Although the Second Circuit has not analyzed *DelCostello* in the light of

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[1] The plaintiffs are not pursuing their tolling argument on this appeal.

the three-factor test for retroactivity set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), it is nonetheless clear that the *Chevron Oil* analysis favors retroactive application of *DelCostello*. In addition, the Second Circuit's decision in this case is supported by decisions from *all* of the Courts of Appeal which have considered this issue, including the Court of Appeals for the Ninth Circuit.

Although the decisions from the Court of Appeals for the Ninth Circuit on the issue of retroactivity are not entirely consistent with the decisions from the other Courts of Appeal which have considered the issue, recent decisions in the Ninth Circuit have given *DelCostello* retroactive effect. Accordingly, it cannot be argued that a real and embarrassing conflict among the circuits exists. Moreover, the present petition does not present for review an issue of substantial public importance. The additional fact that all of the Circuits would apply *DelCostello* retroactively under the circumstances present in this case also militates against Supreme Court review of the decision of the Court of Appeals.

Finally, and despite the plaintiffs' protestations to the contrary, no constitutional issues are raised by the Second Circuit's retroactive application of *DelCostello*. Accordingly, there is no basis for Supreme Court review of this case.

ARGUMENT

I. The Court of Appeals' retroactive application of the Supreme Court's decision in *DelCostello* v. *International Brotherhood of Teamsters* was proper.

It has long been a principle of general application that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974). *See also Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 486 n.16 (1981); *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801). As the Court of Appeals for the Second Circuit has recently observed, "the general rule of long standing is that judicial precedents normally have retroactive as well as prospective effect." *Kremer* v. *Chemical Construction Corp.*, 623 F.2d 786 (2nd Cir. 1980), *aff'd*, 456 U.S. 461 (1982) (quoting *National Association of Broadcasters* v. *F.C.C.*, 554 F.2d 1118 (D.C. Cir. 1976)). Indeed, until 1965, when this Court established that "we are neither required to apply, nor prohibited from applying, a decision retrospectively," an "absolute rule of retroaction" was widely assumed to exist. *Linkletter* v. *Walker*, 381 U.S. 618, 629 (1965).

In the present case, the plaintiffs' cause of action accrued no later than September 6, 1979. The plaintiffs filed their original Complaint in this action on or about June 13, 1980, some nine months later. The District Court dismissed the plaintiffs' Complaint as time-barred, relying on the Supreme Court's decision on *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. ——, 76 L. Ed. 2d 476 (1983). On appeal, the plaintiffs argued that at the time their cause of action accrued in 1979, the courts

had given no indication that a limitations period shorter than the relevant state statute of limitations governing contract actions would be applied to hybrid Section 301/unfair representation claims, and, therefore, that it would be inequitable to apply the six-month period established in *DelCostello* to their claims.[2] The plaintiffs maintained that an exception to the general rule favoring retroactivity should be made in this case, arguing that a non-retroactive application of *DelCostello* was mandated under the three-factor test articulated by this Court in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97 (1971).

The Court of Appeals rejected the plaintiffs' arguments and affirmed the District Court's judgment, relying on its earlier decision in *Welyczko* v. *U.S. Air, Inc.,* 733 F.2d 239 (2nd Cir. 1984). In *Welyczko,* the only issue presented for review was whether *DelCostello* was properly given retroactive application by the lower court in dismissing the plaintiffs' hybrid wrongful discharge/unfair representation claim.[3] Significantly, the plaintiff's cause of action in *Welyczko* accrued in 1975. 733 F.2d at 240. Thus, the same considerations raised by the plaintiffs in this case

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[2] Presumably, the plaintiffs would urge the court to adopt either Connecticut's six-year statute of limitations for actions founded upon written contracts, Conn. Gen. Stat. §52-576, or, alternatively, the three-year statute of limtations for actions oral contracts, Conn. Gen. Stat. §52-581.

[3] The plaintiff's claim in *Welyczko* arose under the Railway Labor Act, 45 U.S.C. §151 *et seq.,* which governs air carriers in lieu of the LMRA. The *Welyczko* court, however, regarded this as a distinction "without import," stating that "the same policies which lead the Supreme Court to apply a federal statute of limitations to claims under §301 of the Labor Management Relations Act apply with equal force to substantially identical claims under the Railway Labor Act." 733 F.2d at 240.

with respect to the claim that *DelCostello* was not "foreshadowed" by earlier decisions were present in *Welyczko*. The *Welyczko* court nonetheless held that the District Court's retroactive application of *DelCostello* to dismiss the plaintiff's claims was proper.

In reaching its decision to apply the *DelCostello* holding both retroactively and prospectively to hybrid Section 301/unfair representation claims, the *Welyczko* court specifically declined to use the *Chevron Oil* test to determine if non-retroactive application was warranted. 733 F.2d at 241. Rather, the *Welyczko* court deferred to this Court's implicit decree in *DelCostello* that that decision was to be given retroactive effect:

> The Supreme Court not only adopted a new statute of limitations in *DelCostello*; it applied that time bar retroactively to govern the very claim at issue in the case before it. We have noted that "the Supreme Court is well aware of how to avoid the effects of applying one of its rulings retroactively to the case at bar." *Cates* v. *Trans World Airlines, Inc.*, 561 F.2d 1064, 1073 (2nd Cir. 1977). Thus, when that court itself has given retrospective application to a newly-adopted principle, "no sound reason exists for not doing so here." *Holzsager* v. *Valley Hospital*, 646 F.2d 792, 797 (2nd Cir. 1981). A Court of Appeals must defer to the Supreme Court's directive on this issue, explicit or implicit. See *United States* v. *Fitzgerald, supra* at 582. Certainly, its intended application is clear in this case.

Id. See DelCostello, supra at ——, 76 L. Ed. 2d at 494 (reversing Second Circuit's decision in *Flowers* v. *Local 2602, United Steelworkers of America*, 671 F.2d 87 (2nd Cir. 1982), and holding that six-month limitations period

set forth in Section 10(b) of the LMRA governs action filed in January, 1979).[4] The Second Circuit's decision to give *DelCostello* retroactive application, both in *Welyczko* and in the present case, is thus entirely consistent with this Court's decision in *DelCostello* to apply its holding retroactively to one of the two consolidated cases decided by that opinion.

It should be noted, however, that even if the Second Circuit favored analysis of *DelCostello* under the three-factor test enunciated in *Chevron Oil Co.* v. *Huson, supra.*, retroactive application of the *DelCostello* rule would nevertheless be appropriate under the facts of this case. It cannot, for example, be argued that *DelCostello* established "a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil Co.* v. *Huson, supra,* at 106. At the time the plaintiffs' cause of action had accrued, neither the Supreme Court's decision in *International Union* v. *Hoosier Cardinal Corp.,* 383 U.S. 696 (1966), nor the Second Circuit's decision in *Abrams* v. *Carrier Corp.,* 434 F.2d 1234 (2nd Cir. 1970), had foreclosed the possibility that hybrid Section 301/unfair representation claims to vacate arbitration awards would be governed by a shorter statute of limitations than the six or three-year

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[4] It should also be noted that in *DelCostello* the District Court had considered whether this Court's decision in *United Parcel Service, Inc.* v. *Mitchell,* 451 U.S. 56 (1981), should be applied retoactively, and determined, through an examination of the *Chevron Oil* factors, that retroactive application of *Mitchell* was appropriate. 524 F.Supp. 721 (D. Md. 1981). The Fourth Circuit approved that decision without comment. 679 F.2d 879 (4th Cir. 1982). This Court, in turn, tacitly approved that conclusion.

limitations period for contract actions.[5] Indeed, at least two lower courts in the Second Circuit had held, prior to 1979, that the considerably shorter state statute of limitations governing appeals from arbitration awards would apply to such Section 301 claims.[6] *Wallace* v. *American Telephone and Telegraph Co., Inc.*, 460 F. Supp. 755, 758 (EDNY 1978); *Barbarino* v. *Anchor Motor Freight, Inc.*, 421 F. Supp. 1003, 1006 (WDNY 1976). These decisions were consistent with the Second Circuit's cautionary advice in *Abrams* that the applicable statute of limitations must be determined on a case-by-case basis. *Abrams* v. *Carrier Corp., supra,* at 1252 n.15. Moreover, as the Third Circuit observed in *Perez* v. *Dana Corp., Parrish Frame Division,* 718 F.2d 581 (3rd Cir. 1983), the case law in the Circuits "was confused and divided and thus provided no clear past precedent on which [the plaintiffs] could have relied." *Id.* at 587. Thus, when the plaintiffs' cause of action arose, there was no clear past precedent upon which they could reasonably have relied in waiting nine or more months to file their suit.

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[5] *Hoosier Cardinal* involved a straightforward breach of contract claim by a union against an employer under Section 301. In *Abrams,* the employees' wrongful discharge claim was not arbitrated, and, hence, was not analogous to an action to set aside an arbitration award. In the present case, the plaintiffs initially sought to vacate the New England Joint Area Conference Committee's arbitration award; despite deletion of this claim in the Second Amended Complaint, the plaintiffs' suit, if successful, would still have that direct effect. *See United Parcel Service* v. *Mitchell,* 451 U.S. 56, 61 (1981).

[6] Section 52-420 of the Connecticut General Statutes provides that an application to vacate, modify or correct an arbitration award must be made within 30 days from the notice of the award.

An examination of the second *Chevron Oil* factor also leads to the conclusion that retroactive application of the *DelCostello* rule is appropriate. By establishing a six-month statute of limitations derived from federal rather than state law, the *DelCostello* court was able to satisfy three important policy considerations: the need for uniformity in the treatment of similar claims, the desire "to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights," and the need for a rule which assures "the relatively rapid final resolution of labor disputes." *DelCostello, supra* at ——, 76 L. Ed. 2d at 485-494. As the Eleventh Circuit has observed, "to apply . . . state statutes and deny retroactive application to *DelCostello* would retard rather than further the federal interests in prompt resolution of labor disputes, finality, and consistency embodied in *DelCostello.*" *Rogers* v. *Lockheed-Georgia Co.*, 720 F.2d 1247, 1250 (11th Cir. 1983).

Finally, with respect to the third *Chevron Oil* factor, it is clear that the equities in the present case do not militate against retroactive application of *DelCostello.* Although the original Complaint in the present case was filed over four years ago, the District Court proceedings never advanced beyond consideration of the statute of limitations issue. Although the plaintiffs engaged in very limited discovery against the Union, it certainly cannot be said that the plaintiffs engaged in any intensive preparation of the merits of the case. As the First Circuit observed under similar circumstances, "plaintiff has been stopped before he could get started; he has not been deprived of a judgment obtained before *DelCostello* came down." *Graves* v. *Smith's Transfer Corp.*, 736 F.2d 819, 822 (1st Cir. 1984).

Given the Supreme Court's implicit decree that *DelCostello* should be applied retroactively, the Court of Appeals was not required to determine if the *Chevron Oil* test man-

dates a different result. Nevertheless, it is clear that an examination of *DelCostello* in the light of the *Chevron Oil* factors favors retroactive application of the *DelCostello* rule. Thus, the Court of Appeals properly affirmed the judgment of the District Court, and this Court should affirm the decision of the Court of Appeals.

II. There is not a substantial conflict among the circuits concerning the retroactive application of *DelCostello* which would warrant the granting of the plaintiff's petition.

The plaintiffs argue that there is a conflict among the Circuit Courts of Appeal concerning the retroactive application of *DelCostello.* Nine of the ten circuits which have considered the issue have unequivocally held that *DelCostello* should be given retroactive effect.[7] Until very recently, only the Ninth Circuit refused to apply *DelCostello* retroactively.[8]

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[7] *See, e.g. Graves* v. *Smith's Transfer Corp.*, 736 F.2d 819 (1st Circuit 1984); *Welyczko* v. *U.S. Air, Inc.*, 733 F.2d 239 (2nd Cir. 1984); *Perez* v. *Dana Corp., Parrish Frame Division*, 718 F.2d 581 (3rd Cir. 1983); *Murray* v. *Branch Motor Express Co.*, 723 F.2d 1146 (4th Cir. 1983); *Edwards* v. *Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Jones* v. *Truck Drivers Local Union No. 299*, 748 F.2d 1083 (6th Cir. 1984); *Ernst* v. *Indiana Bell Telephone Company, Inc.*, 717 F.2d 1036 (7th Cir. 1983); *Lincoln* v. *International Association of Machinsts and Aerospace Workers*, 723 F.2d 627 (8th Cir. 1983); *Rogers* v. *Lockheed-Georgia Company*, 720 F.2d 1247 (11th Cir. 1983).

[8] *See Scoggins* v. *Boeing Co., Inc.*, 742 F.2d 1225 (9th Cir. 1984); *Barina* v. *Gulf Trading and Transportation Co.*, 726 F.2d 560 (9th

(Footnote continued on following page)

In two recent cases, however, the Ninth Circuit has refused to adopt an absolute rule of non-retroactivity, and has permitted the retroactive application of the *DelCostello* rule where its affect would be to lengthen, rather than shorten, the applicable statute of limitations. *Aragon* v. *Federated Department Stores, Inc.*, 750 F.2d 1447, 1451 (9th Cir. 1985); *Glover* v. *United Grocers, Inc.*, 746 F.2d 1380 (9th Cir. 1984).[9] Both *Aragon* and *Glover* involved hybrid Section 301 actions challenging the results of arbitration awards. In both cases, the applicable state statute of limitations governing actions to vacate arbitration awards was shorter than the six-month limitations period set forth in Section 10(b) of the LMRA. Accordingly, as no prejudice would result in either case from the application of the longer federal statute of limitations, the Ninth Circuit gave retroactive effect to *DelCostello* in both cases. *Aragon* v. *Federated Department Stores, Inc., supra* at 1453; *Glover* v. *United Grocers, Inc., supra* at 1382-1383.

Thus, all of the circuit courts which have faced the issue, including the Ninth Circuit, have determined that *DelCostello* may be given retroactive effect. It has long been the practice of this Court to deny certiorari "except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarras-

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(Footnote continued from preceding page)

Cir. 1984); *McNaughton* v. *Dillingham Corp.*, 722 F.2d 1459 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S. Ct. 259, 83 L. Ed. 2d 227 (1984); *Edwards* v. *Teamsters Local 36*, 719 F.2d 1036 (9th Cir. 1983), *cert. denied*, —— U.S. ——, 104 S. Ct. 1599, 80 L. Ed. 2d 130 (1984).

[9] Neither of these cases are cited by the plaintiffs in their Petition.

sing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). While the Ninth Circuit's treatment of the retroactivity issue is somewhat anomalous, the decisions of that court of appeals certainly do not create a real and embarrassing conflict among the circuits.[10] This is particularly true in the present case, where it is clear that all of the circuit courts which have decided the issue would apply *DelCostello* retroactively, rather than apply the shorter state statute of limitations governing actions to set aside arbitration awards.[11]

Finally, it is clear that the present petition raises an issue of limited public importance. The number of cases which could be affected by a decision from this court concerning the retroactive application of the *DelCostello* rule is finite and steadily decreasing. Thus, even if the Ninth Circuit's treatment of the retroactivity issue may be regarded as creating a genuine conflict among the circuits, the impact of any resolution of that conflict is narrowly circumscribed. Thus, the present petition does not concern principles the settlement of which is of substantial importance to the public.

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[10] It should be noted that this Court has twice denied certiorari on this very issue in cases in which the Ninth Circuit declined to apply *DelCostello* retroactively. *See McNaughton* v. *Dillingham Corp., supra; Edwards* v. *Teamsters Local 36, supra.*

[11] *See* Discussion at pp. 10-11, *supra.*

III. The plaintiffs' petition does not present a Constitutional issue for the Court to determine.

The plaintiffs argue in their petition that the retroactive application of the *DelCostello* decision in this case raises significant constitutional issues under the Fifth Amendment of the United States Constitution. The plaintiff's position here is premised on the assumption that the six-month limitations period adopted in *DelCostello* is shorter than the state statute of limitations that would otherwise apply under the facts of this case. As the defendants have already pointed out, however, this assumption is not well-founded.[12] Accordingly, certiorari should be denied in this case even if there were a constitutional dimension to the retroactivity issue.

This court has repeatedly held, however, that "the constitution neither prohibits nor requires retrospective effect." *Linkletter* v. *Walker,* 381 U.S. 618, 629 (1965). *See, e.g., United States* v. *Johnson,* 457 U.S. 537, 542 (1982); *Desist* v. *United States,* 394 U.S. 244, 248-249 (1969), *reh. denied,* 395 U.S. 931 (1969); *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.,* 287 U.S. 358, 364 (1932); *Tidal Oil Co.* v. *Flanagan,* 263 U.S. 444, 455 (1923). As Justice Cardozo stated in *Great Northern R. Co.* v. *Sunburst Oil & Refining Co., supra,* "we think the federal constitution has no voice upon the subject." *Id.* at 364. In fact, this Court has held that retroactive application of a judicial decision which changes existing law does not constitute an impairment of contract obligations or a denial of due process. *Tidal Oil Co.* v. *Flanagan, supra.* Thus, there is no constitutional dimension to the retroactivity issue, and certiorari should accordingly be denied.

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[12] *See* Discussion at pp. 10-11, *supra.*

CONCLUSION

For the foregoing reasons, the plaintiffs' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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